IN THE DAVIDSON COUNTY CHANCERY COURT
AT NASHVILLE

SENTINEL TRUST COMPANY, and its Directors, Danny N. Bates, Clifton J. Bates, Howard H. Cochran, Bradley S. Lancaster, and Gary L. O'Brien, Petitioners, v. KEVIN P. LAVENDER, Commissioner of the Tennessee Department of Financial Institutions, Respondent.	)	No. 04-1934-I

SUPPLEMENTAL RESPONSE TO PETITION FOR WRIT OF SUPERSEDEAS

Respondent, Kevin P. Lavender, Commissioner of the Tennessee Department of Financial Institutions, by and through this attorney of record, the Attorney General and Reporter for the State of Tennessee, submits this supplemental response to the Petition for Writ of Supersedeas.

ARGUMENT

Petitioners have filed a petition for writ of supersedeas seeking to stay the Commissioner's Notice of Liquidation of Sentinel Trust Company. Tenn. Code Ann. § 27-9-106 provides that:

> (a) If the ***order or judgment rendered by such board or commission made the basis of the petition for certiorari shall make any material change in the status of any matter determined***

> ***therein***, the petitioner may, upon reasonable notice to the board or commission and other material defendants, apply to the chancellor, at the time of filing such petition, for a supersedeas, and the chancellor, in the chancellor's discretion, may grant a ***writ of supersedeas to stay the putting into effect of such order or judgment or any part thereof.***
>
> (b) No such supersedeas shall be granted until a good and sufficient bond, in an amount to be fixed and approved by the chancellor, shall have been given by the petitioner, conditioned to indemnify the defendants named in the petition from any injury that may result by reason of the granting of such supersedeas. (Emphasis added).

The Tennessee Supreme Court has stated with respect to the writ of supersedeas:

> Our statutes recognize the writ of supersedeas as an established remedy, but give no general definition of the writ, nor description of its office. But the only cases in which a supersedeas is provided for, or mentioned in the Code, . . . are cases in which it is given as ancillary to the writ of error and the writ of certiorari, and in which its office is merely to stay proceedings under the judgment or decree while the cause is pending in the appellate court; and the proper office and function of the writ of supersedeas is, undoubtedly, merely to stay proceeding.[1]

Thus, the writ of supersedeas is collateral to a suit and only operates to restrain the execution of the judgment below, whether interlocutory or final, while the court above has the cause under investigation.[2]

Neither the statutes, nor the case law, however, set forth what factors or grounds should be considered by a court in determining whether or not to grant a petition for writ of supersedeas. Rather, the statute simply provides that the "chancellor, in the chancellor's discretion, may grant

---

[1]*McKee v. Board of Elections*, 173 Tenn. 276, 116 S.W.2d 1033, 1037-38 (1938)(quoting *McMinnville & M.R.Co., et al. v. Huggins, et al.*, 47 Tenn. 217, 223).

[2]*Howell v. Thompson*, 130 Tenn. 31,, 170 S.W.253 (1914).

a writ of supersedeas to stay the putting into effect of such order or judgment or any part thereof." Since a writ of supersedeas functions similarly to a temporary injunction (which is, in fact, a form of supersedeas) in that it essentially maintains the *status quo*, the Commissioner submits that it would be appropriate for this Court to consider the same factors that are considered in the granting or denying of a request for a temporary injunction. Those factors are: (1) likelihood of success on the merits; (2) irreparable harm to the movant; (3) harm to the defendant and others; and, (4) the impact of an injunction on the public interest.[3] As discussed more fully herein, the balance of these factors weighs heavily against the granting of the writ of supersedeas and, therefore, such petition should be denied.

1. Likelihood of success on the merits.

Petitioners cannot establish a likelihood of success on the merits of their position that the Commissioner acted illegally or in excess of his jurisdiction when he took possession of Sentinel Trust Company, and subsequently determined to liquidate the company. As discussed in Respondent's Initial Response to the Petitions for Writ and Supersedeas, on May 18, 2004, the Commissioner of the Tennessee Department of Financial Institutions issued an Emergency Notice of Possession of Sentinel Trust Company pursuant to Tenn. Code Ann. § 45-2-1502. Section (a) of that statute authorizes the Commissioner to take possession if, after a hearing, he finds that any one of the enumerated conditions exists. However, subsection (c)(1) authorizes the Commissioner to take possession without a prior hearing, if in his opinion, an emergency exists which will result in serious losses to the depositors. Subsection (c)(1) further provides that "[a]ny person aggrieved and directly affected by this action of the commissioner may have a

[3]*See* Tenn.R.Civ.P. 65.04(2). *See also, M.C. West, Inc. v. Lewis*, 522 F.Supp. 338 (M.D.Tenn. 1981).

review by certiorari as provided in title 27, chapter 9," *i.e.*, the common-law writ of certiorari. Here, the Commissioner determined that in his opinion, an emergency did in fact exist and issued the Emergency Notice of Possession. That Notice specifically informed Petitioners of the right to have the decision revied by common-law writ of certiorari in Davidson County Chancery Court.

Subsequently, on June 18, 2004, the Commissioner issued a Notice of Liquidation of Sentinel Trust Company pursuant to Tenn. Code Ann. § 45-2-1502(c)(2). That subsection does not contain any provision for review of this action by the Commissioner. However, Tenn. Code Ann. § 45-1-108(a) provides that:

> A person who is aggrieved by an order of the commissioner issued pursuant to § 45-1-107 is entitled to judicial review as provided in the Uniform Administrative Procedures Act, compiled in title 4, chapter 5. A person who is aggrieved and directly affected by an order of the commissioner issued pursuant to other provisions of this title may seek judicial review as provided in title 27, chapter 9, except that judicial review of orders issued pursuant to chapter 5 of this title shall be governed by the Uniform Administrative Procedures Act.

In accordance with this provision, the Notice of Liquidation once again specifically informed Petitioners of their right to seek judicial review under the common-lw writ of certiorari.

Petitioners did not file their Petition for Writ of Certiorari and Writ of Supersedeas untill June 29, 2004 — almost six weeks after the Commissioner had issued the Emergency Notice of Possession and two weeks after the Commissioner issued the Notice of Liquidation. Moreover, the primary ground asserted in support of both writs was purely a legal argument — Petitioners' belief that the Commissioner exceeded his jurisdiction and/or acted illegally when he took

possession of Sentinel pursuant to the provisions of Tenn. Code Ann. § 45-2-1502, as that statute only speaks in terms of "state banks" and Sentinel is not a state bank, but a trust company.

As fully discussed in the Commissioner's initial response, this argument simply has no merit. Tenn. Code Ann. § 45-1-124(b) plainly states on its face that "[u]nless the commissioner determines otherwise, ***the provisions of chapters 1 and 2 of this title, and the rules thereof, shall also apply to the operation and regulation of state trust companies*** and banks whose purposes and powers are limited to fiduciary purposes and powers." (Emphasis added). The Legislature's intent that state trust companies be operated and regulated according to the same laws as state banks could not be stated any clearer in this statute. Furthermore, the legislative history of Public Chapter 112 of the Acts of 1999 also clearly expresses this intent. In discussing the purpose of the Senate Bill 1603 (which became Public Chapter 112), both the House and Senate Sponsors stated that one of the purposes of the act was to clarify what trust companies are subject to the banking act and the control of the Commissioner.

> Senator Elsea: . . . Thank you, Mr. Chairman, members of the committee. Senate Bill 1603 is requested by the Department of Financial Institutions. And the law governing the r5egulation of the fiduciary activities of banks and trust companies in Tennessee is unclear and in need of updating and modernization. The present— presently, the las, the Tennessee banking act, provides that no trust company may be incorporated or be qualified to act as a fiduciary unless it is incorporated under the banking act or federal law. However, there is no definition of what constitute [sic] a trust company and there is little guidance as to what fiduciary powers financial institution [sic] may engage in. ***And this bill will provide the guidance as to what constitutes authorized trust activity and what trust companies are subject to the banking act.*** ...
> (Emphasis added)[4]

---

[4]Transcript of Hearing before the Senate Commerce Cmmittee, March 9, 1999. A copy of the tape of that hearing and a transcript are attached hereto and incorporated herein by this reference.

> Rep. Woods: ...Senate Bill 1603 is an administration bill as it resulted from a study by the financial institutions over the summer and it was passed on the consent calendar and the Senate was, and removed from a consent calendar in the House for further explanation. And I'd like to give it at this time.
> Basically, the bill does five (5) things. It gives state chartered trust the authority — the same authority — as federal chartered trust have at this time. It allows them also to reach across state lines to establish a trust with a reciprocal agreement if one does exist with the other state. ***It clarifies what trust activities are. It brings them under the control of the Commissioner of Insurance and Banking here in the state*** and it eliminates the practice of — old practice— of shelf — of establishing shelf charters. Under which a business can come in and buy a banking charter that has been out of business for five (5) years. This changes that to two (2) years to keep it more current so that this practice wouldn't. ***It clarifies the powers and responsibilities of financial institutions and it defines what are fiduciary activities it can enter into***. That's the explanation of that and I move that it be passed on third and final consideration. (Emphasis added)[5]

Petitioners have admitted on numerous occasions that Sentinel Trust Company is indeed a trust company. As such, the law is crystal clear that the provisions of chapters 1 and 2 of Title 45 apply to the operation and regulation of Sentinel. As previously discussed, the Commissioner took possession and determined to liquidate Sentinel pursuant to Tenn. Code Ann. § 45-2-1502, which is clearly a provision of chapter 2 of Title 45. Accordingly, Petitioners cannot establish a likelihood of success on the merits of their argument that the Commissioner acted illegally or in excess of his jurisdiction in taking possession and liquidating Sentinel.

Petitioners also cannot establish a likelihood of success on the merits that there is not material or substantial evidence in the record to support the Commissioner's decision to liquidate Sentinel Trust Company. Petitioners have not denied that a cash deficiency in some unknown

---

[5]House Floor Debate, April 28, 1999 Session. A copy of the tape and a transcript thereof are attached hereto and incorporated herein by this reference.

amount exists in the pooled fiduciary account. Nor have they denied that this deficiency is the result of their using trust funds of the non-defaulted bond issues — without the bond issuers' knowledge or agreement — to pay expenses incurred with respect to defaulted bond issues. Instead, Petitioners have filed several affidavits of President Danny Bates, all of which attempt either: (1) to minimize the amount of that cash deficiency in the pooled fiduciary account or (2) to demonstrate how Petitioners will eventually eliminate the deficiency through current fees from the non-defaulted bond issues and collections from the defaulted bond issues.

For example, Mr. Bates states in his most recent affidavit that according to his computations, there was only a deficiency of $3,167,678 in the pooled fiduciary account as of March 31, 2004.[6] However, in a meeting with the Commissioner on April 30, 2004 — just one month later — Mr. Bates admitted that the deficiency was approximately $7.25 million.[7] Furthermore, at the time the Commissioner took possession on May 18, 2004, Sentinel's own fiduciary accounting system, AccuTrust, showed a cash balance of $10,280,912 in the pooled fiduciary account, and its other account system, Quickbooks, showed a cash balance of $10,386,921, while the bank statement from SunTrust for that account showed only a cash balance of $2,472,928.[8] Finally, by the time the Commissioner determined to liquidate Sentinel on June 18, 2004, which is the date which should be looked to in assessing the company's financial condition, the Receiver and Department staff had determined that the cash deficiency in

---

[6]Bates Affidavit in support of Petition for Writ of Mandamus, at ¶ 17.

[7]*See* R. Vol. 1, 203; Vol. II, 317, 323.

[8]*See* Affidavit of Wade McCullough, Exhibit 1 to Commissioner's Response to Petition for Writ of Certiorari and Writ of Supersedeas.

the pooled trust account ranged from $7,913,451.11 as reflected in Quickbooks to $8,731,956.11 as reflected in AccuTrust.[9]

The Receiver and Department staff had also determined that Sentinel was operating at a net loss ($306,482.967 as of the date of possession)[10] and that the potential recovery from the defaulted bond issues would not be over $3.4 million, which amount did not take into account the necessary expenses (legal fees, etcs.) or time to eventually realize those recoveries.[11]

Based upon this information, and the fact that Sentinel has at most a net worth of approximately $1.3 million [12], the Commissioner determined that Sentinel was insolvent in an amount of at least $6.225 million and that rehabilitation of the company was not feasible and, therefore, the company should be liquidated. Petitioners do not actually deny any of these facts (other than to assert that the actual cash deficiency is less than reflected on their records). Instead, they take issue with the fact that the Commissioner determined to liquidate instead of letting Petitioners make up the cash shortage over time "through legal collection work followed by a cash payment by Sentinel at the end to cover any of its obligations."[13]

However, under the scope of review for common-law writ of certiorari, the reviewing court does not engage in weighing or balancing the evidence when determining whether the

---

[9]*Id. See also* R. Vol. III, 623-641.

[10]*See* Affidavit of Wade McCullough. *See also* R.Vol. III, 364.

[11]R. Vol. III, 637.

[12]Approximately $870,000 of the company's net worth is attrributable to the land and buildings in Nashville and Hohenwald, TN. *See* R. Vol. III, 633.

[13]Bates Affidavit in support of Petition for Writ of Mandamus at ¶ 17.

board's decision rests on any material or substantial evidence,[14] nor does the reviewing court substitute its judgment for that of the board or inferior tribunal.[15] Furthermore, "it matters little that there may be evidence to support a conclusion contrary to that reached by the Board. . . . So long as there is any material and substantial evidence to support the Board's decision, the Board's decision [should] be affirmed." [16] There clearly is substantial and material evidence in the record to support the Commissioner's decision to liquidate, and accordingly, Petitioners cannot demonstrate a likelihood of success on this issue.

2. Irreparable harm to the movant.

A specific finding of immediate and irreparable injury to the movant is considered the most important prerequisite that a court must examine and find when ruling upon a motion for temporary injunction. In fact, the absence of irreparable injury must end the court's inquiry.[17] Injunctive relief should not issue to address injury which is neither threatened nor imminent by defendants merely to assuage plaintiff's fears that the profitability of its business may be diminished in the future.[18] Generally, courts will not grant temporary injunctions when the

---

[14] *Watts v. Civil Serv. Bd. for Columbia,* 606 S.W.2d 274, 277 (Tenn. 1980); *Tennessee Cartage Co. v. Pharr*, 184 Tenn. 414, 419, 199 S.W.2d 119, 121 (1947); *Case v. Shelby County Civil Serv. Merit Bd.*, 98 S.W.3d 167, 172 (Tenn.Ct.App. 2002); *Hoover, Inc. v. Metropolitan Bd. of Zoning App.*, 924 S.W.2d 900, 904 (Tenn.Ct.App. 1996).

[15] *421 Corp. v. Metropolitan Gov't*, 36 S.W.3d at 474; *Whittemore v. Brentwood Planning Comm'n*, 835 S.W.2d 11, 15 (Tenn. Ct. App. 1992).

[16] *Id.*

[17] *See Los Angeles v. Lyons*, 461 U.S. 95, 111-12, 103 S.Ct. 1660, 1670, 75 L.Ed.2d 675 (1983); *Warner v. Central Trust Co., N.A.*, 715 F.2d 112, 123-24 (6th Cir. 1983); *Aluminum Workers Int'l Union v. Consolidated Aluminum Corp.*, 969 F.2d 437, 444 (6th Cir. 1982).

[18] *See generally Roseboro v. Fayetteville City Board of Education*, 491 F.Supp. 110, 112 (E.D.Tenn. 1977).

alleged harm is purely economic loss. In order to obtain a preliminary injunction, the harm must be irreparable, not merely substantial.[19]

Petitioners assert that if the liquidation of Sentinel is not stayed, the company will eventually be destroyed. This assertion is correct. Tenn. Code Ann. § 45-2-1504 sets forth the procedures that the Commissioner is to follow in liquidating a bank or trust company in his possession. That statute contemplates that after all claims have been paid, any assets remaining shall be distributed to the stockholders and that when all assets have been distributed in accordance with chapters 1 and 2 of Title 45, "the commissioner shall file an account with the court. Upon approval thereof, the commissioner shall be relieved of liability in connection with the liquidation and the charter shall be cancelled."[20]

However, it is the Petitioners' own unlawful and unsound actions that created this situation. As discussed in the initial Response, Petitioners have admitted that they used pooled fiduciary funds to provide operating capital for non-related defaulted bond issues, thereby creating a fiduciary cash shortfall that greatly exceeded Sentinel's current operating capital and estimated net worth of $1.3 million. Petitioners have further admitted that as of April 30, 2004, this deficiency was approximately $7.25 million. Thus, as Petitioners' own critical mismanagement resulted in Sentinel's insolvency, necessitating its liquidation by the

---

[19]*Hodge Business v. U.S.A. Mobile*, 910 F.2d 367, 369 (6th Cir. 1990).

[20]Tenn. Code Ann. § 45-2-1504(i) and (k).

Commissioner, they should not now be allowed to ground their contention for injunctive relief on their own possibly unlawful actions.[21]

3. Substantial Harm to Other and the Public Interest.

Unquestionably, the State of Tennessee has a strong interest in the operation of financial institutions within the State of Tennessee. This is particular true with respect to financial institutions acting as fiduciaries, as these institutions are often entrusted with millions of dollars on behalf of other entities. Indeed, such was the case with Sentinel Trust Company. At the time the Commissioner took possession on May 18, 2004, Sentinel was holding approximately $36 million in fiduciary investment assets. As an essential element to ensuring the safe and sound operation of financial institutions engaged in fiduciary activities, the State must be satisfied of the financial viability of those institutions so that there is reasonable assurance that the fiduciary funds are used solely for the purposes intended as set forth in any Indenture or Trust Agreements. Here, Petitioners have admitted they have used the fiduciary funds of non-defaulted bond issues contrary to the Indenture or Trust Agreements and without the bond issuers' knowledge or consent. These actions have resulted in a deficiency in those fiduciary funds of $7.9 - $8.6 million dollars and the subsequent insolvency of Sentinel in at least $6.25 million.

Another essential element to ensuring the financial viability of financial institutions engaged in fiduciary activities is a properly functioning accounting system that fully and

---

[21] *See e.g., Golden Eagle Refining Company, Inc. v. The United States*, 4 Cl.Ct. 613, 621 (1984). In that case, the government had sought to terminate its contract with plaintiff for JP-4 jet fuel and to solicit reprocurement of such fuel from other sources. Plaintiff sought to enjoin such action, asserting that it would suffer irreparable harm as the loss of the contract would essentially put it out of business because the government was the only buyer of such fuel. The court refused to enjoin termination, declaring that by its own actions, the plaintiff had developed its dependency on the contract and should not be allowed to base its claim of irreparable harm on its own imprudent actions.

accurately reconciles the institution's fiduciary accounts. Here, Petitioners have utilized two separate accounting systems and inconsistencies between these two systems have existed from the start. The evidence in the record reflects that Petitioners did not consistently reconcile the accounts in these systems with each other or with the bank statement. The evidence in the record further reflects that Petitioners have never instituted any sort of internal audit function, but instead, have placed the sole authority for recording and reconciling all fiduciary accounts.

A writ of supersedeas staying the ongoing liquidation of Sentinel Trust Company will undoubtedly result in harm to the State, the bond issuers and the bondholders. Sentinel's current revenues are not enough to cover the cost of the company's normal operations — as evidenced by the fact that Sentinel was operating at a net loss of over $300,000 as of May 18, 2004. Even the fees that Mr. Bates alleges should have been collected for June, 2004 would have barely been sufficient to cover salaries and benefits for that month.

Moreover, a number of the non-defaulted bond issuers are seeking to transfer their accounts to a new fiduciary, as provided for in their Agreements. Currently pending in the Lewis County Chancery Court are two separate motions seeking to transfer a number of bond issues to new fiduciaries. One of those motions filed on behalf of Chancellor Health Partners, seeks to transfer at least six corporate (private entity) bond issues. These bond issues make up approximately 25% of the entire non-defaulted corporate bond issues for which Sentinel is Trustee. Additionally, a number of other bond issuers have requested transfer of their accounts to new fiduciaries, but have not yet taken legal action, waiting to see the result of these motions.

The Commissioner has objected to these motions on the grounds that under the liquidation provisions set forth in Tenn. Code Ann. § 45-2-1504(c), the Receiver (on the

Commissioner's behalf) has been preparing for the termination and transitioning of Sentinel's fiduciary accounts in a manner that "will do the best for the most." To that extent the Receiver has been preparing a bid package for distribution to the financial institution/trust department industry. If the ongoing liquidation is stayed, however, the Receiver will be unable to go forward with the distribution of this bid package, which could produce a positive bid and ultimately result in additional funds being available for Sentinel estate and the fiduciary cash deficiency. Furthermore, such staying of the liquidation will not stay the transfer of these accounts or others, as transfer is being sought pursuant to the terms of the Indenture/Escrow Agreements.

The transfer of these accounts will further reduce the amount of fees to Sentinel, placing the company in an even greater deficit position. Additionally, by allowing such "cherry-picking" of issues, the ability of the Receiver to secure replacement fiduciaries for the remaining bond issues will be greatly jeopardized.

The staying of the ongoing liquidation will also obviously increase the costs of the receivership. This increase in costs has a two-fold effect. First, because those costs are paid out of the company's revenues, which are ever dwindling, it decreases the amount of funds available to pursue collection on the defaulted bond issues. Although Petitioners have used the funds of non-defaulted bond issues to pursue collections on defaulted bond issues, the Commissioner simply cannot engage in such actions. The second effect is that those bond issues not able to transfer while the liquidation is stayed, will end up bearing a disproportionate percentage of those costs.[22]

---

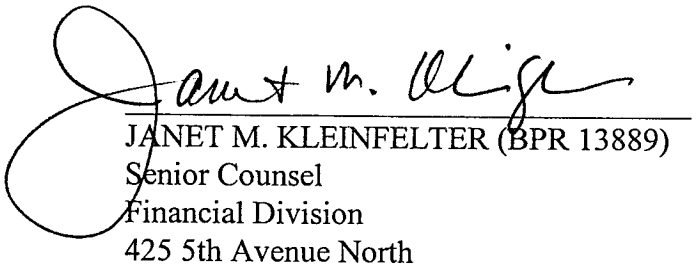
[22]The bond issues who may have difficulty in transferring their accounts in the event liquidation is stayed are the very same bond issues whose funds Sentinel has "borrowed." Thus, these issuers have deficiencies in their accounts and it is unlikely that a new fiduciary would be willing to accept responsibility for such accounts.

Ultimately, the public interest is served by ensuring that the tremendous amount of fiduciary investment assets of all of Sentinel's bond issuers are properly safeguarded and by allowing the Commissioner to expeditiously liquidate Sentinel Trust Company, an insolvent trust company that has clearly engaged in unsafe and unsound practices and that cannot continue its normal operations.

Finally, if this Court determines that a writ of supersedeas should be granted, this Court must require an appropriate bond pursuant to Tenn. Code Ann. § 27-9-106(b). In light of the immediately preceding discussion regarding the considerable potential for harm to the State of Tennessee and the bond issuers and bondholders, the Commissioner submits that, in the event this Court grants the Petitioners' Petition for Writ of Supersedeas, Petitioners should be required to secure a cost bond in the amount of $7.6 million in order to adequately protect the interests of the Defendants, in the event the writ of supersedeas was wrongfully granted.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General and Reporter



JANET M. KLEINFELTER (BPR 13889)
Senior Counsel
Financial Division
425 5th Avenue North
Nashville, Tennessee 37243
(615) 741-7403

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been sent by facsimile transmission and first class U.S. Mail, postage prepaid, to: Carroll D. Kilgore, Branstetter, Kilgore, Stranch & Jennings, 227 Second Avenue North, Fourth Floor, Nashville, TN 37201-1631, this 4th day of August, 2004.

Janet M. Kleinfelter

JANET M. KLEINFELTER
Senior Counsel

HOUSE REGULAR CALENDAR

Summary of General Bills

Wednesday, April 28, 1999 at 2:00 P.M.

Published by the Office of the Chief Clerk

(Asterisked number indicates which bill is printed in your file.)

---

1. *HB 0810 by *Kisber (SB1107 by Cooper).
Managed Care Organizations - Requires certain disclosures of directors and others involved with MCOs in TennCare program. - Amends TCA Title 56 and Title 71.

Summary: This bill would require officers and directors of a managed care organization and any person who is the legal or beneficial owner of 5 percent or more of an ownership interest in a managed care organization that participates in TennCare to disclose conflict of interest information that public officials must disclose. This information includes things such as:

(1) The major source or sources of private income of more than $1,000;
(2) Any investment which the person making disclosure, that person's spouse, or minor children residing with that person has in any corporation or other business organization in excess of $5,000 or 5 percent of the total capital (it would be sufficient to identify the industry, it is not necessary to give the name of the firm or the dollar amount of the investment);
(3) Any person, firm, or organization for whom compensated lobbying is done by any associate of the person making disclosure, that person's spouse, or minor children residing with the person making disclosure; and
(4) Compensation from the managed care organization.

This bill would also require an official in the legislative or executive branch and the official's immediate family to disclose an ownership interest or other connection as an officer, employee or director with any managed care organization that participates in TennCare.

Disclosures under this bill must be made to the commissioner of health by March 1, for the previous calendar year.

2. HB 0268 by *Sharp (*SB0174 by Fowler).
Public Records - Clarifies appropriate fee calculations for registrars relative to recording assignment and release of mortgage, deed of trust or other lien - Amends TCA Section 8-21-1001.

Summary: This bill would change the language describing the type of financial instruments for which the register may charge a fee. Under present law, the register may charge a fee of $4.00 "FOR EACH AND EVERY RELEASE OF MORTGAGE OR LEIN ON PAGE. . ." This bill would allow the register to charge a $4.00 fee "FOR EACH AND EVERY RELEASE OF A MORTGAGE, DEED OF TRUST OR OTHER LEIN IN AN INSTRUMENT, PLUS THE PER PAGE FEE . . . FOR EACH PAGE IN EXCESS OF ONE PAGE." The per page fee is $4.00 for each additional page.

Present law also allows a register to charge a $4.00 fee "FOR EACH AND EVERY ASSIGNMENT OF ANY INSTRUMENT ON A PAGE. . . EXCEPT THAT THE MINIMUM FEE FOR REGISTERING ANY INSTRUMENT CONTAINING AN ASSIGNMENT SHALL BE $8.00." This bill would allow the register to charge the $4.00 fee "FOR EACH AND EVERY ASSIGNMENT OF AN INSTRUMENT IN AN INSTRUMENT, PLUS THE PER PAGE FEE . . . FOR EACH PAGE IN EXCESS OF TWO PAGES." The per page fee is $4.00 also.

3. HB 1103 by *Godsey, *McDaniel, *Cole (Carter), *Mumpower, *Wood, *Scroggs, *Walker (Rhea), *Rinks, *McKee, *Ford S, *Roach, *Bittle, *Montgomery, *Boyer, *Walley, *Harwell, *Hagood, *Armstrong, *McCord, *Pleasant, *Sharp, *Sargent, *Todd, *Black, *Hassell, *Beavers, *Davis (Wash), *Whitson, *Hargett (*SB1587 by Blackburn, *McDaniel).

Aged Persons - Imposes civil penalty of up to $10,000 per violation on persons who use practices in violation of Tennessee Consumer Protection Act which victimize persons who are at least 60 years of age. - Amends TCA Title 47, Chapter 18, Part 1.

Summary: This bill would impose a civil penalty up to $10,000 for each violation of the Tennessee Consumer Protection Act that victimizes elder persons. "Elder person" is defined as any person 60 years of age or older.

This bill would apply to violations where the violator knew or should have known that the conduct was unfair, misleading or deceptive, or where the violator knew or should have known that such violator was soliciting marketing or promoting to an elder person.

Each violation may include, but is not limited to, each elder person solicited, each advertisement distributed, each misrepresentation or deceptive statement that appeared on a solicitation, and each contact (telephone call, direct mail solicitation, or in person solicitation) with an elder person.

The state's burden of proving that the violator knew or should have known that the solicitation, marketing or promotion was made to an elder person is "a preponderance of the evidence" and may be met by the following means (or any other means of proof):

(1) More than 50 percent of the persons solicited were elder persons;
(2) More than 50 percent of the persons that purchased goods or services were elder persons;
(3) Testimony of elder persons that were solicited, from which one could conclude they were over 60 years of age merely by contact with that elder person;
(4) Testimony of elder persons who purchased goods or services, from which one could conclude they were over 60 years of age merely by contact with that elder person;
(5) Company records indicating that the age of the person solicited was over 60 years of age;
(6) Company records indicating that the age of the person who purchased goods or services was over 60 years of age;
(7) Advertisements or solicitations were promoted on television, radio or publications read or viewed by an average of more than 50 percent of elder persons;
(8) Presenting affidavits of elder persons stating they are over 60 years of age and that the company solicited, marketed or sold to them; or
(9) Presenting evidence or information indicating that the company targeted or otherwise desired to primarily solicit elder persons.

4. HB 1119 by *Wood, *McDaniel, *Walker (Rhea) (*SB1603 by Elsea, *McNally, *Dixon).

Banks and Financial Institutions - Rewrites laws regulating banks and financial institutions; adds regulations for private trust companies. - Amends TCA Title 45, Chapters 1 and 2 and Section 45-11-105(c).

Summary: Under present law, state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers are not subject to all rules and regulations for banks. This bill would require such state trust companies and banks to comply with the Tennessee Business Corporation Act, rules and regulations of the department of financial institutions, and Tennessee law concerning banking institutions, unless the commissioner of financial institutions determines otherwise.

This bill would prohibit any company from acting as a fiduciary in Tennessee except the following:

(1) A corporation organized or reorganized under the Banking Act whose purposes and powers are limited to fiduciary purposes and powers, including a trust company previously organized under Tennessee law (state trust company);
(2) A state bank authorized to act as a fiduciary;
(3) A savings association or savings bank organized under Tennessee law and authorized to act as a fiduciary;
(4) A national bank with its principal place of business in Tennessee and authorized by the comptroller of the currency to act as a fiduciary;

(5) A federally chartered savings association or savings bank with its principal office in Tennessee and authorized by its federal chartering authority to act as a fiduciary;
(6) An out-of-state bank with a branch in Tennessee established or maintained pursuant to Tennessee law concerning banking institutions, or a trust office authorized by the commissioner;
(7) An out-of-state trust company with a trust office authorized by the commissioner;
(8) A foreign bank with a trust office authorized by the commissioner; and
(9) A private trust company to the extent authorized by the commissioner.

AUTHORIZED FIDUCIARY ACTIVITIES

This bill would authorize a depository institution, bank, or trust company authorized to act as a fiduciary with its principal place of business in Tennessee (state trust institutions) to conduct the following activities:

(1) Act as a fiduciary in any state or foreign country;
(2) Conduct any activities at any office outside Tennessee that are authorized for a trust institution chartered by the state where the office is located, including activities prohibited by Tennessee law if the commissioner waives such prohibitions;
(3) Perform any act as a fiduciary at each office, other than the principal office, where the trust institution is authorized to act as a fiduciary by the commissioner (trust office) and at an authorized branch;
(4) Exercise any incidental power that is reasonably necessary to enable a state trust institution to exercise commonly accepted fiduciary powers conferred by the Banking Act;
(5) Exercise any other power authorized by the Banking Act concerning banking institutions or any power authorized to federally chartered trust institutions, subject to regulation by the commissioner; and
(6) Exercise powers authorized to trust institutions chartered by another state, subject to regulation by the commissioner.

This bill would authorize an out-of state trust institution that establishes and maintains at least one office in Tennessee to conduct the same activities at such office as a state trust institution would be authorized to conduct.

ESTABLISHMENT OF TRUST OFFICE

This bill would require any state trust company to maintain an office in Tennessee that is registered with the commissioner as the state trust company's home office where the company does business, keeps books, and at least one executive officer of the company maintains an office (principal office). Also, this bill would require a state trust company to apply to the commissioner to change the location of any of such company's offices in the same manner that banks are presently required to apply for a change in location.

This bill would authorize a state trust institution to establish or acquire and maintain trust offices anywhere in Tennessee. This bill would exempt any state trust company, or any other company chartered to act as a fiduciary that is not a bank or savings institution having deposits insured by the Federal Deposit Insurance Corporation or a foreign bank, from any prohibition on acquiring an institution that has not been in operation for at least five years. A state trust institution would be required to notify the commissioner before establishing or acquiring a trust office.

If a trust institution is acquiring an existing trust office, the trust institution would be required to provide evidence that all fiduciary obligations and liabilities of the parties have been properly discharged or otherwise assumed. An acquiring trust institution would automatically assume all the rights, privileges and obligations of the selling trust institution. If a state trust institution is establishing or acquiring a trust office outside Tennessee, the trust institution would be required to provide evidence that the laws of the jurisdiction where the office is to be located permit such an office. The period of review for a notice to establish or acquire a trust office by a state trust institution would be 30 days, unless extended by the commissioner. This bill would authorize the commissioner to deny approval for an additional office if the commissioner finds either of the following:

(1) The trust institution providing notice lacks sufficient financial resources to expand without adversely affecting its safety or soundness; or
(2) The proposed office would be contrary to the public interest.

This bill would authorize an out-of-state trust institution to acquire a trust office in Tennessee in the same manner as a state trust institution, subject to the following:

(1) The state where the out-of-state trust institution has its principal place of business in the United States permits similar institutions chartered under Tennessee law to establish or acquire trust offices and conduct activities similar to those permitted to out-of-state trust institutions by this bill and present law in such state;

(2) An out-of-state trust institution would be authorized to provide notice to the commissioner through the bank supervisory agency with primary responsibility for chartering and supervising such institution (home state regulator);

(3) An out-of-state trust institution would be required to provide the commissioner with evidence that such institution is in compliance with Tennessee law and any requirements of its home state regulator; and

(4) The period for review for a notice to establish or acquire a trust office by an out-of-state trust institution would be 60 days.

OTHER PROVISIONS

This bill would authorize any Tennessee resident to designate any trust institution as such person's fiduciary.

This bill would authorize any trust institution to operate under any name that the commissioner does not determine to be misleading. Also, this bill would authorize any trust institution with a trust office in Tennessee and its clients to designate any of the following as the state whose law will govern written agreements between the parties, instruments under which such institution acts, and applicable fiduciary investment standards:

(1) Tennessee;
(2) A state where clients reside; or
(3) The state where such institution has its principal office.

This bill would prohibit a state trust company from dealing in goods or owning or operating a business unrelated to its fiduciary business, except as necessary to fulfill a fiduciary obligation to a client. Also, this bill would prohibit a state trust company from pledging or creating a lien on any of its assets except:

(1) To secure repayment of money borrowed;
(2) For the same purposes that banks are authorized to pledge assets under Tennessee law, including to enable such institution to act as an agent for the sale of obligations of the United States, to secure borrowed funds, to secure the public funds of a governmental entity, and for any other purpose approved by the commissioner; or
(3) By rules adopted under Tennessee law concerning banking institutions.

Any act, deed, conveyance, pledge or contract for any other purpose would be void.

This bill would authorize a state trust company to merge with another trust company or into a depository institution pursuant to applicable provisions of Tennessee law for voluntary corporate changes of banking institutions. Trust companies would be exempt from any requirement that an institution be in operation for five years before engaging in a merger transaction. This bill would permit mergers of state trust companies into a resulting out-of-state trust institution to the same extent that another state permits Tennessee trust institutions to merge with such other state's trust companies.

This bill would require the board of a state trust company to be responsible for the proper exercise of fiduciary powers and for each matter pertinent to the exercise of such powers. Subject to the commissioner's approval, this bill would authorize the board of a state trust company to sell such company's assets, including the right to control accounts established with such company, without shareholder approval, subject to the following:

(1) The commissioner finds that such company's creditors and clients are jeopardized by insolvency or imminent insolvency of such company and a sale is in the best interest of such company's creditors and clients; and

(2) The buyer assumes and promises to discharge liabilities to clients, liabilities for employees' salaries prior to the sale, obligations incurred by the commissioner for supervising the sale, and fees and assessments due the department.

This bill would authorize the commissioner to issue an order temporarily or permanently prohibiting a trust institution from acting as a fiduciary in this state.

Present law authorizes the commissioner to appoint a receiver to liquidate or reorganize a state bank that the commissioner has taken possession of. This bill would authorize a receiver

appointed for reorganization or liquidation to exercise all rights, powers, duties and obligations that the commissioner in possession would be granted.

Present law requires the commissioner to terminate all fiduciary positions and settle all fiduciary accounts of a state bank after liquidation of such bank. This bill would authorize the commissioner to transfer such fiduciary accounts to another corporate fiduciary.

This bill would prohibit any person, firm, or corporation that is not a trust institution from using the term "trust" in connection with operating a business in Tennessee. Such prohibition would not apply to any existing person, as of July 1, 1999, whose name contains the term "trust." The commissioner would be authorized to permit the use of the term "trust" by entities other than trust institutions if it would not mislead the public.

Present law requires non-depository trust companies to pay a $1,000 annual fee for each office or place of business operated by a trust company. This bill would delete the requirement that a trust company pay the fee for each place of business, so the fee would only be owed for each office.

This bill would require the charter of any institution chartered under Tennessee law concerning banking institutions to be null and void if such institution ceases to receive deposits, pay out money on checks and make loans, or act as a fiduciary for purposes of a trust company, for a period of two years.

Present law authorizes a bank or trust company having paid-up capital and surplus of $120,000 to be appointed a fiduciary. This bill would change present law by authorizing a bank or trust company authorized to act as a fiduciary having and maintaining paid-in capital and surplus of $500,000 to be appointed a fiduciary.

Present law authorizes banks to appoint related banks, trust companies or trust departments to perform the bank's acts, obligations and responsibilities with respect to a fiduciary account. This bill would authorize banks to appoint an unrelated party to perform such acts, obligations and responsibilities. Also, this bill would authorize banks, trust companies and trust departments to delegate investment, management and administrative functions to an unrelated party.

This bill would provide for the following, concerning trust companies in existence before July 1, 1999.

(1) A charter granted to a trust company by the commissioner would not be void due to the enactment of any amendment or repeal of the laws under which such company was formed, if such company is in operation on July 1, 1999;

(2) This bill would exempt companies engaged in activities subject to the Banking Act on July 1, 1999, but formed before May 5, 1980, and not previously subject to regulation by the commissioner from this bill's application requirement, but such companies would be otherwise subject to the Banking Act;

(3) This bill would require companies authorized by their charter, before May 5, 1980, to engage in fiduciary activities, but not engaging in fiduciary activities on July 1, 1999, to file an application with the commissioner and comply with the Banking Act; and

(4) This bill would authorize all state trust companies operating on July 1, 1999, to have a period of time to be determined by the commissioner to conform to the requirements of the Banking Act.

PRIVATE TRUST COMPANY

This bill would authorize the commissioner to exempt a company acting as a fiduciary in this state that does not transact business with the general public (private trust company) from any or all requirements of the Banking Act. A private trust company would be required to submit a detailed, written application for any exemption from the Banking Act.

This bill would require a private trust company to do the following, in order to maintain an exempt status:

(1) Not transact business with the public;

(2) File an annual certification that such company is maintaining any conditions and limitations of its exempt status; and

(3) Notify the commissioner of any change in such company's address, telephone number, or principal office.

This bill would require the exempt status of any private trust company to terminate upon any change of control of such company. The person acquiring such company would be required to file a new application if such person desires to re-establish such company's exempt status.

This bill would authorize the commissioner to take the following action against a private trust company for any violation of the laws and regulations that this bill would impose on such companies:

(1) Institute any action or remedy prescribed by the Banking Act or any applicable rule; or
(2) Refer a private trust company to the attorney general and reporter for institution of an action that would result in revocation of such company's charter if such company cannot show that it acted under lawful authority.

This bill would authorize the commissioner to revoke a private trust company's exempt status, following notice and an opportunity for a hearing, in the following circumstances:

(1) Such company makes a false statement under oath on any document that the department is required to file;
(2) Such company fails to submit to an examination by the commissioner;
(3) Such company withholds requested information from the commissioner; or
(4) Such company violates any provision applicable to exempt private trust companies.

This bill would prohibit a private trust company from appealing any such revocation of exempt status by the commissioner. A private trust company that has its exempt status revoked would be subject to all requirements for non-exempt state trust companies.

This bill would authorize a private trust company to terminate its private status and begin transacting business with the general public by giving notice to the commissioner in the same manner that this bill would require a state trust institution to apply for establishment or acquisition of a trust office.

FINANCIAL INSTITUTIONS CONVERSION ACT

Present law requires a financial institution that applies to the commissioner to convert its charter in order to do business as another type of financial institution to submit a nonrefundable fee in the amount required for a new bank charter application. The amount charged for a new bank charter application is a fee that the commissioner requires. This bill would change such fee to an amount established by regulation.

5. *HB 0260 by *Buck (SB0876 by Burks).

Search & Seizure - Adds popularly elected city judges to judges who may issue forfeiture warrants; permits judges to request tape recorder for forfeiture warrant hearings; removes provision defining when seizing officer "acts in bad faith." - Amends TCA Title 40, Chapter 33.

Summary: Present law authorizes general sessions, circuit and criminal court judges to issue forfeiture warrants. This bill would authorize popularly elected city judges to issue forfeiture warrants in addition to those judges presently authorized to do so.

This bill would require the administrative office of the courts to provide a tape recorder for the purpose of recording a hearing on an application for a forfeiture warrant upon the request of a judge authorized to issue a forfeiture warrant.

Present law authorizes a person whose property is seized to seek damages from the seizing agency if a seizing officer acts in "bad faith" in seizing or returning the property. Under present law, an officer acts in "bad faith" if the officer acts intentionally, dishonestly, or willfully or there is no reasonable legal or factual basis for the officer's actions. This bill would delete the present law provision that defines when a seizing officer acts in "bad faith."

6. *HB 0675 by *Hargrove, *Naifeh, *DeBerry L, *Rinks, *Williams (Wil), *Arriola, *McDonald, *Kisber, *Armstrong, *Turner (Shelby), *Stulce, *Sands, *Davidson, *Pinion, *Jones, S., *Lewis, *Ridgeway, *Bone, *Robinson, *Ferguson, *Tindell, *Eckles, *West, *Hood, *Caldwell, *Fraley, *Turner (Ham), *Maddox, *Odom, *Pruitt, *Winningham, *McMillan (SB0892 by Rochelle, *Cooper).

Law Enforcement - Provides that school resource officers may be employed with funds generated under the Safe Neighborhoods or federal universal hiring

TRANSCRIPT - HOUSE SESSION/4-28-99

House Bill 1119

Speaker of the House is ready for full consideration of House Bill 1119 by Representative Woods and others. It was previously considered and recent on today's calendar. The Senate bill is on the desk. Representative Woods, you're recognized.

Representative Woods: ...Senate Bill 1603 is an administration bill as it resulted from a study by the financial institutions over the summer and it was passed on the consent calendar and the Senate was, and removed from a consent calendar in the House for further explanation. And I'd like to give it at this time.

Basically, the bill does five (5) things. It gives state chartered trust the authority--the same authority--as federal chartered trust have at this time. It allows them also to reach across state lines to establish a trust with a reciprocal agreement if one does exist with the other state. It clarifies what trust activities are. It brings them under the control of the Commissioner of Insurance and Banking here in the state and it eliminates the practice of--old practice--of shelf--of establishing shelf-charters. Under which a business can come in and buy a banking charter that has been out of business for five (5) years. This changes that to two (2) years to keep it more current so that this practice wouldn't. It clarifies the powers and responsibilities of financial institutions and it defines what are fiduciary activities it can enter into. That's the explanation of that and I move that it be passed on third and final consideration.

You heard the explanation. Gentlemen move to pass Senate Bill 1603...
Vote: yes--97, no--0

TRANSCRIPT - SENATE COMMERCE/3-9-99

Senate Bill 1603

Chairman ("Chrmn"): Senator Elsea is recognized on this very convoluted, complicated Senate Bill 1603.

Sen Elsea: Mr. Chairman, you have been so nice. I tell you what, we really appreciate you. We're going to miss you. (Laughter, mutterings, unintellible) Thank you, Mr. Chairman, members of the committee. Senate Bill 1603 is requested by the Department of Financial Institutions. And the law governing the regulation of the fiduciary activities of banks and trust companies in Tennessee is unclear and in need of updating and modernization. The present--presently, the law, the Tennessee banking act, provides that no trust company may be incorporated or be qualified to act as a fiduciary unless it is incorporated under the banking act or federal law. However, there is no definition of what constitute [sic] a trust company and there is little guidance as to what fiduciary powers financial institution [sic] may engage in. And this bill will provide the guidance as to what constitutes authorized trust activity and what trust companies are subject to the banking act. And presently, the federal chartered financial institution, they can establish trust offices across state lines, but Tennessee law currently does not provide that authority for state nondepository trust compliances nor state banks desiring to establish nonbranch trust offices across state lines. And this bill will explicitly authorize state chartered financial institutions to establish trust offices across state lines on a reciprocal basis. And current law would appear to require that family trust companies be chartered and regulated to the same extent as other trust companies. The Department feels that this is unnecessary if the family trust company...(Senator stops speaking. Laughter from the other senators.)

Chrmn: Sen. Elsea, you got the floor.

Sen. Elsea: I will in just a minute, because I sure don't want it when they--if they don't ask the question, I want an answer today while I got the commissioner over here.

Chrmn: We're not going to recess.

Elsea: But anyway, the--but this bill clears the--establishes a streamline regulatory scheme to substantially exempt private family trust companies from the banking act if they do not conduct business with the public. And now, Mr. Chairman. Oh, one more, yeah. This bill modernizes the banking act to clarify the powers and responsibilities of financial institution that engage in fiduciary activity. Now, Mr. Chairman, I move the bill.

Chrmn: Sen Elsea makes the proper motion on this particular senate bill. Is there a second? Is there a second? Is there a second? Sen. Dixon seconds the bill. Discussion on the bill. Any amendments, Sen. Elsea? You sure? If not, if no discussion on the bill, Madame Secretary call the roll.

(Roll call.)

Chrmn: 9-0-0, the bill be referred to the counter committee. Before we adjourn, members of the committee, I believe that--wait a minute Sen Crutchfied, you're late. Next week, we're gonna have uh, some discussion, at the hearing, on the Governor's fair tax proposal. We've heard from a lot of businesses. Need to say, business comes underneath the umbrella of this committee. If there's anyone that y'all would like to have uh, to come before the committee. Be sure and let Luthie (sp?) know. Once again, we appreciate the fine work of our staff and unless there's any question, we're adjourned.